

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 15270
Issued to: FRANK H. COLE

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2292

FRANK H. COLE

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 22 July 1981, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida suspended Appellant's captioned license for two months, plus six months on twelve months' probation, upon finding him guilty of misconduct and negligence. The specifications of Charge 1 (misconduct), found proved, alleged that while serving as operator/person in charge on board the United States M/V GREEN COVE O.N. 587880, under authority of the license above captioned, from 16 March 1981 to 24 March 1981, Appellant wrongfully undertook a voyage in excess of 12 hours with one licensed operator and did wrongfully absent himself from the wheelhouse for a period of approximately 1-1/2 hours on 23 March 1981, leaving the responsibility of navigation of the vessel and tow to an unlicensed deckhand. The specification of Charge II (negligence), found proved, alleged that while serving as above on 23 March 1981, Appellant failed to post a proper watch in said vessel's pilot house thereby contributing to the collision between its tow and M/B FL 8158 BN, with loss of life.

The hearing was held at Jacksonville, Florida on 18 May 1981.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charges and each specification.

The Investigating Officer introduced in evidence a number of documentary exhibits and the testimony of five witnesses.

In defense, Appellant offered in evidence his testimony.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charges and specifications had been proved. He then served a written order on Appellant suspending License No. 15270 and all documents issued to Appellant for a period of two months plus six months on twelve months' probation.

The entire decision was served on 30 July 1981 via registered mail. Appeal was timely filed on 19 August 1981 and perfected on 21 October 1981.

FINDINGS OF FACT

Between 16 March and 24 March, Appellant was serving as an operator on board the United States M/V GREEN COVE and acting under authority of his license. The vessel was continuously underway for at least one period in excess of 12 hours out of 24 between Jacksonville, Florida and Freeport, Grand Bahamas. Appellant was the only licensed operator on board for this voyage.

Appellant absented himself from the wheelhouse for approximately 1-1/2 hours on 23 March 1981 leaving the operation of the vessel and its tow to an unlicensed mate. The vessel was in the Intracoastal Waterway, Halifax River, Florida. While Appellant was absent a collision occurred between the tow and a motorboat resulting in loss of life. The mate, although never licensed, had more than 48 years of tow boat experience.

BASES OF APPEAL

This appeal has been taken from the decision of the Administrative Law Judge. In his original appeal, Appellant concedes that the facts admitted during the hearing were sufficient to prove violations as alleged in Charge I and its specifications, but maintains that they were "technical" violations. It is urged that the competency of an unlicensed individual, should overcome the "technical" requirement of having a license. Appellant also contends that the evidence presented was insufficient to prove that he wrongfully absented himself from the wheelhouse of the vessel for a 1-1/2 hour period. Appellant further agrees that a written admonition would be an appropriate sanction under the circumstances. In a supplement of his appeal, Appellant contends that all charges and specifications should be dismissed for lack of jurisdiction based on Decision on Appeal No. 2249 (DURAND).

APPEARANCES: Howell, Howell, Lilies, Braddock & Milton of Jacksonville, Florida by Joseph P. Milton, Esq.

OPINION

With respect to Charge II and its specification there is merit to Appellant's insistence that there was no subject matter jurisdiction. An operator is subject to charges for professional activities peculiar to his licensed status solely for the period during which he is directing and controlling the vessel pursuant to his license. See Appeal Decision No.s 2262(SHERMAN), 2249(DURAND)

and 2153(McKINNEY).

In this case, Appellant was not in control of the vessel when the collision occurred. Therefore, he cannot be held responsible for any failure to post a proper lookout at that time. See also Appeal Decision No. 2122 (RODIECK).

However, Charge I and its specifications relate to Appellant's role in proper manning and control of the vessel. The substance of the charge is a violation of 46 U.S.C. 405(b)(2).

In addressing the issue of jurisdiction in this case, the Administrative Law Judge in his opinion stated:

"Therefore, until the Commandant decides otherwise, I elect to hold that where an individual is required to hold an operators license as a condition of his employment as captain or master, the Coast Guard has jurisdiction...for acts or omissions committed in the performance of his duties as captain and master..."

It is common practice in the maritime industry to refer to operators of uninspected towing vessels as "captain" Neither the term "captain" nor "master" is mentioned in the law. The responsibilities of an operator and master are quite different. Fulfilling the manning requirements of a vessel is the responsibility of the master. However, the manning requirements spelled out in 46 U.S.C. 405(b)(2) are not the responsibility of an operator of uninspected towing vessels. The legislative history of 405(b)(2) and a careful reading of the statute itself establish that the operator's license is a control not a management license. That being the case, to obtain jurisdiction, even under the condition of employment test, conduct which could place the license in jeopardy must relate to control of the vessel. It is questioning whether ensuring vessel manning is included. See also Decision on Appeal 2169 (FOSSANI).

However, in addition to the manning requirement, 46 U.S.C. 406(b)(2) provides that "An uninspected towing vessel in order to assure safe navigation shall, while underway, be under the actual direction and control of a person licensed by the Secretary to operate in the particular geographic area..." The cited statute addresses control of a vessel. The conduct of Appellant impacted on the control of the vessel. This provides the basis for Coast Guard jurisdiction. Decision on Appeal No. 2058 (SEARS), sets forth guidelines for relinquishing control to an unlicensed operator. If one licensed operator is permitted to relinquish control, indiscriminately to an unlicensed individual, the statute would be meaningless. The responsibility for violating this

section of the statute should be placed on the operator.

Appellant stipulated that he relinquished control to an unlicensed individual and went to his cabin from 0930 until 1100 but argues that, although unlicensed, the individual was more experienced than Appellant. However, the relevant test is the issuance of a license by the Coast Guard. The statute requires this. He was properly found guilty of Specification 2 of Charge I.

CONCLUSION

Specification 2 of Charge I alleging misconduct is proved. Specification I of Charge I and Charge II and its Specification are not proved. Since the specification found proved and those not proved resulted from one continuous event rather than separate events, the sanction as announced by the Judge is appropriate.

ORDER

The findings of the Administrative Law Judge with regard to Specification I of Charge I and Charge II and its Specification are set aside. The order of the Administrative Law Judge dated 22 July 1981 at Jacksonville, Florida as MODIFIED IS AFFIRMED.

B. L. Stabile
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 4th day of March 1983.